

Senate Bill No. 989

CHAPTER 510

An act to amend Sections 25395.84 and 25395.85 of, to add Article 7 (commencing with Section 25395.102) and Article 8 (commencing with Section 25395.109) to Chapter 6.82 of Division 20 of, and to repeal Article 7 (commencing with Section 25395.105) of Chapter 6.82 of Division 20 of, the Health and Safety Code, relating to hazardous materials.

[Approved by Governor September 27, 2006. Filed with
Secretary of State September 27, 2006.]

LEGISLATIVE COUNSEL'S DIGEST

SB 989, Committee on Environmental Quality. Hazardous material: bona fide ground tenant: remedial actions.

Existing law, the California Land Reuse and Revitalization Act of 2004, provides that an innocent landowner, a bona fide purchaser, or a contiguous property owner, as defined, qualifies for immunity from liability from certain state laws for pollution conditions caused by a release or threatened release of a hazardous material, if the innocent purchaser, bona fide purchaser, or contiguous property owner meets specified conditions. The act also prohibits an agency from requiring an innocent landowner, bona fide purchaser, or contiguous property owner to take a response action under certain state laws. The act defines the term "agency" as the Department of Toxic Substances Control, the State Water Resources Control Board, or a California regional water quality control board. Existing law repeals the act on January 1, 2010.

The act defines the term "applicable law" as meaning certain state statutory and common laws that impose liability on an owner or occupant of property for pollution conditions caused by a release or threatened release of hazardous material on, under, or adjacent to the property.

The bill would require a bona fide ground tenant, as defined, who seeks to qualify for immunity to make all appropriate inquiries, and enter into an agreement with an agency along with one or more specified entities that agree to take responsibility for implementation of a site assessment and response plan.

The bill would provide that the immunity provided under these provisions would be from an applicable statute. The bill would authorize a party to an agreement to request an agency to issue a certification of immunity and would require the agency to provide this certification within 60 days after the agency makes certain specified determinations. The bill would authorize an agency to withdraw the certification if the agency, after providing the bona fide ground tenant notice and an opportunity to cure, determines that the bona fide ground tenant materially deviated from

the agreement or induced the agency to issue the certificate by fraud or intentional misrepresentation.

The people of the State of California do enact as follows:

SECTION 1. Section 25395.84 of the Health and Safety Code is amended to read:

25395.84. (a) A court of competent jurisdiction may award reasonable attorneys' fees and experts' fees to a person who initiates a claim under an applicable law for contribution for, or recovery of, response costs incurred for a response action, or for any other response costs incurred at a site, if the person meets all of the following criteria:

(1) The person is a bona fide purchaser, an innocent landowner, a contiguous property owner, or a bona fide ground tenant, as defined in subdivision (b) of Section 25395.102, and qualifies for immunity pursuant to this chapter.

(2) The person is a prevailing party.

(3) On or before 20 calendar days prior to the date of the trial on issues relating to the response costs at issue, the person serves on the defendant both of the following:

(A) If a response plan has been approved for that site pursuant to Article 6 (commencing with Section 25395.90) or Article 7 (commencing with Section 25395.102), as applicable, a copy of the approved response plan.

(B) A written demand for compensation setting forth the specific sum demanded from the defendant, including a statement of the reasoning supporting the demand. The amount of written demand shall include all response costs sought from the defendant at issue, including all interest, but shall not include litigation expenses, attorneys' fees, and experts' fees. The amount of the demand may include any alleged consequential damages.

(b) In determining whether to award reasonable attorneys' fees and experts' fees pursuant to this section, a court shall consider the relationship of the amount of the written demand described in subparagraph (B) of paragraph (3) of subdivision (a) to the total sum of the response costs and, if appropriate and included in the demand, the consequential damages in the written demand, to the final determination of the costs and damages by the trier of fact.

(c) A court may award reasonable attorneys' fees and experts' fees to an agency that is the prevailing party in an action arising out of this chapter.

SEC. 2. Section 25395.85 of the Health and Safety Code is amended to read:

25395.85. An innocent landowner, bona fide purchaser, contiguous landowner, or bona fide ground tenant, as defined in subdivision (b) of Section 25395.102, may seek contribution from any person who is

responsible for a discharge or release of hazardous materials for which the innocent landowner, bona fide purchaser, contiguous landowner, or bona fide ground tenant incurs agency oversight costs for the review of a response plan or oversight of the implementation of a response plan subject to this chapter.

SEC. 3. Article 7 (commencing with Section 25395.105) of Chapter 6.82 of Division 20 of the Health and Safety Code is repealed.

SEC. 4. Article 7 (commencing with Section 25395.102) is added to Chapter 6.82 of Division 20 of the Health and Safety Code, to read:

Article 7. Bona Fide Ground Tenant Immunity

25395.102. (a) Except as otherwise provided in this article, the definitions in Article 2 (commencing with Section 25395.63) and Article 6 (commencing with Section 25395.90) shall govern the interpretation of this article.

(b) “Bona fide ground tenant” means a person who establishes by a preponderance of evidence and maintains all of the following:

(1) The person acquires a nonfee interest in, and control of, the real property at a site on or after January 1, 2007, pursuant to one of the following:

(A) A ground lease with a term of 25 years or more.

(B) An easement with a term of 25 years or more.

(C) Any other legal means for site access and use that provides for a term of 25 years or more, and is acceptable to the agency entering into an agreement pursuant to this article.

(2) The person is in compliance with subdivisions (c), (d), (e), and (f) of Section 25395.80.

(3) All releases of hazardous materials at the site occurred before the person obtained legal access to and control over the site, except for a release that is of a type, nature or amount that does not require reporting to a regulatory authority pursuant to applicable law or other applicable statutory or regulatory reporting requirements and for which the agency determines all appropriate actions have been taken.

(4) The person did not cause or contribute to a release of hazardous materials at the site, other than a release that is of a type, nature or amount that does not require reporting to a regulatory authority pursuant to applicable law or other applicable statutory or regulatory reporting requirements.

(5) (A) The person has contractually agreed with one or more persons or entities set forth in subdivision (a) of Section 25395.103 that either of the following revenue sources be dedicated to, or pledged to secure a loan the proceeds of which are dedicated to, implementation of the response plan approved pursuant to this article:

(i) All payments by that person to the site owner, at least until such time as a response plan has been approved by the agency and the agency has

determined that something less than all of the payments are sufficient to implement the response plan.

(ii) Any alternate assets or revenue streams that are acceptable to the agency.

(B) To ensure that the revenue stream required by subparagraph (A) remains available to implement the response plan approved pursuant to this article, the person may utilize an Internal Revenue Code Section 468B settlement trust or other acceptable security mechanism that allows the agency to utilize the earmarked funds to complete the cleanup if there is a default by a party that is contractually obligated to implement the response plan pursuant to an agreement under this article. Agreements pursuant to this article shall permit subordination of the security mechanism to permit financing for site cleanup.

(6) The person is not potentially liable, or affiliated with a person who is potentially liable, for the release at issue through any of the following circumstances:

(A) A direct or indirect familial relationship.

(B) A contractual, corporate, or financial relationship, unless the contractual, corporate, or financial relationship is created by the instruments by which the person obtains control and implements the development of the site, or is created by a contract for the sale of goods or services.

(C) The result of a reorganization of a business entity that was potentially liable for the hazardous substances at issue.

(c) For the purpose of this article, “release” does not include passive migration.

(d) “Site” shall have the definition set forth in Section 25395.79.2, except that the exclusion for petroleum sites set forth in paragraph (3) of subdivision (b) of that section shall not apply.

25395.103. (a) A bona fide ground tenant who seeks to qualify for the immunity pursuant to Section 25395.104 shall make all appropriate inquiries, and shall enter into an agreement pursuant to this article with an agency, and one or more entities that agree to take responsibility for implementing a site assessment and response plan pursuant to subdivision (b). The entity shall be one of the following:

(1) The site owner.

(2) A redevelopment agency.

(3) A city or county.

(b) Except as otherwise provided in subdivision (c), an agreement entered into pursuant to this article shall provide that the entity that accepts responsibility for the site assessment and response plan shall conduct a site assessment that substantially complies with the requirements of Section 25395.94 and implement a response plan that substantially complies with the requirements of Section 25395.96. For purposes of any health risk assessment, as specified in paragraph (2) of subdivision (a) of Section 25395.94, that is conducted for a site subject to this article, the intended site occupants shall include any person who is expected to reside at, work

at, or otherwise physically cross onto, the boundaries of the site. Both the site assessment and the response plan shall be approved by the agency. Except as necessary to comply with provisions of this article that differ from Article 6 (commencing with Section 25395.90), agreements pursuant to this article shall substantially conform to agreements developed to implement Article 6 (commencing with Section 25395.90), and shall specifically include the agency cost reimbursement provisions required by subdivision (b) of Section 25395.93.

(c) An agreement entered into pursuant to this article shall provide that the bona fide ground tenant is responsible to the agency for only the portions of the site assessment and the portions of the response plan that the agency determines to be necessary to allow the site to be used for its intended purposes without unreasonable risk to the human health and safety of the intended site occupants. The bona fide ground tenant shall not be responsible to the agency for any other assessment or remediation of soil, soil gas, groundwater, or other media at the site; nor for any assessment or remediation adjacent to, or in the vicinity of, the site. The agreement shall also specify the portion of the site assessment and the response plan to be implemented by the party other than the bona fide ground tenant.

(d) Before finalizing the agreement, the agency shall notify other appropriate agencies, including the host jurisdiction. The agency shall keep, in a permanent archive, copies of all finalized agreements entered into pursuant to this article.

(e) Agreements entered under this article shall not be subject to Chapter 2 (commencing with Section 10290) of Part 2 of Division 2 of the Public Contract Code.

(f) A person who enters into an agreement under this article shall submit sufficient information to the agency for the agency to determine whether the site is eligible, whether the person meets the conditions to qualify as a bona fide ground tenant, and to prepare an agreement pursuant to this section.

25395.104. (a) Except as otherwise provided in this section, a bona fide ground tenant shall qualify for the following immunities:

(1) The bona fide ground tenant shall not be liable under any applicable statute for a claim made by a person, other than an agency, for response costs or other relief associated with a release or threatened release of a hazardous material at the site once the bona fide ground tenant obtains a certification pursuant to subdivision (b) or (c) that the immunity provided by this section has attached.

(2) (A) Except as provided in subparagraph (B), an agency shall not, subsequent to the date of the agreement, take any action under any applicable statute to require a bona fide ground tenant to take a response action on account of a release or threatened release of a hazardous material at a site.

(B) The agency that entered into the agreement pursuant to this article may take action under any applicable statute to enforce the conditions imposed on the bona fide ground tenant pursuant to the agreement.

(b) Except as provided in subparagraph (B) of paragraph (2) of subdivision (a), the immunity provided in this section shall attach to a bona fide ground tenant once the agency certifies in writing that all of the following have occurred:

(1) A site assessment has been completed sufficient for the agency to determine the remedial measures necessary to allow the site to be used for its intended purposes without unreasonable risk to the human health and safety of the intended site occupants.

(2) Except for site monitoring, reporting, institutional controls, operation and maintenance activities, and other ongoing obligations of the bona fide ground tenant, if any, the portion of the site investigation and the response plan necessary to allow the site to be used for its intended purposes without unreasonable risk to the human health and safety of the intended site occupants, including any confirmation sampling required by the agency to confirm that this standard has been met, has been implemented to the agency's satisfaction.

(3) To the extent required in the agreement entered into pursuant to this article, all wells, piping, extraction systems, or similar materials or equipment required for the conduct of remediation efforts to be performed by a person other than the bona fide ground tenant have either been installed to the agency's satisfaction or have been accounted for to the agency's satisfaction in site development plans and specifications.

(4) If applicable, an instrument that restricts or imposes obligations on the present of future uses or activities on the site has been executed and recorded pursuant to Section 1471 of the Civil Code.

(c) A party to an agreement pursuant to this article may request the agency to issue a written certification confirming that the conditions stated in subdivision (b) have been met and that the immunity provided for in this section is in effect. The agency shall provide this certification within 60 days of the date it finds that the conditions stated in subdivision (b) have been met.

(d) The agency that issued a certification pursuant to subdivision (c) may withdraw that certification if it first provides reasonable notice and opportunity for the bona fide ground tenant to take action to prevent the withdrawal, and subsequent to the notice and cure opportunity makes any of the following findings:

(1) A material deviation from those requirements applicable to the bona fide ground tenant under the agreement entered into pursuant to this article that has not been approved by the agency exists and continues to exist subsequent to the notice and cure period.

(2) The bona fide ground tenant induced the agency to issue the certification by fraud, or intentional nondisclosure or misrepresentation.

(e) Upon the agency's certification pursuant to subdivision (c), the immunity provided in this section extends to all of the following:

(1) The bona fide ground tenant and any successor who demonstrates to the agency that the person meets the qualifying conditions of subdivision (b) of Section 25395.102 and subdivisions (c), (d), (e), and (f) of Section 25395.80 and who assumes the bona fide ground tenant's obligations of any agreement entered into pursuant to this article.

(2) A person who provides financing to a person specified in paragraph (1).

(f) The immunity provided in this section does not extend to, and may not be transferred to, a person who was a responsible party, as that term is defined in Section 25323.5 for the release at the site prior to acquiring an interest in the site from the bona fide ground tenant or providing financing as specified in paragraph (3) of subdivision (e).

(g) The immunity provided in this section shall be in addition to any other immunity provided by law.

(h) This section shall not modify or limit the existing authority of a state or local agency to impose a condition on the issuance of a discretionary permit relating to the development, use, or occupancy of a site.

(i) This section shall not relieve a bona fide ground tenant from reporting, disclosure, and notification requirements under any applicable statute.

(j) The entry into an agreement pursuant to this article shall not constitute an admission of any fact or liability or conclusion of law for any purpose or proceeding and a person who enters into an agreement under this article shall not be deemed liable under any other provision of law solely by reason of entering into the agreement.

(k) If the use of the property changes, after a response plan is approved, to a use that requires a higher level of protection, the agency may require the preparation and implementation of a new response plan pursuant to this article.

(l) A bona fide ground tenant that purchases a site subsequent to leasing, or taking an easement in the site, may convert its status to that of a bona fide purchaser pursuant to Article 6 (commencing with Section 25395.90) if the bona fide ground tenant otherwise meets the requirements of Section 25395.69 and Article 6 (commencing with Section 25395.90). Upon the conversion, the bona fide ground tenant shall qualify for any and all immunities available to a bona fide purchaser under this chapter.

(m) If the response plan relies on the use of institutional or engineering controls to make the site suitable for its intended purposes without unreasonable risk to the human health and safety of the intended occupants of the site, the bona fide ground tenant seeking immunity shall provide any applicable financial assurances, using financial assurance guidelines and mechanisms approved by a board, department, or organization of the California Environmental Protection Agency; periodic reports as required by the agency to demonstrate that there remains no unreasonable risk to the human health and safety of the intended occupants. The bona fide ground tenant shall not make any change in use of the site that is

inconsistent with any land use control recorded for the site unless the change is approved by the agency pursuant to Sections 25233 and 25234 or, in the case of the board or a regional board, substantially similar procedures.

25395.105. (a) Notwithstanding subdivision (b) of Section 25395.102, on and after the date when the immunity specified in Section 25395.104 attaches, a person shall remain eligible for immunity if a release of hazardous materials at the site during a response action is de minimis and the agency determines that all necessary response actions to address the release have been taken.

(b) Notwithstanding subdivision (b) of Section 25395.102 with respect to a release of hazardous materials at the site that is not characterized in or through the site investigation or the response plan, a person shall remain eligible for the immunity provided in Section 25395.104, if the person takes response actions with respect to the release of hazardous materials that the agency determines to be necessary to prevent unreasonable risk to the human health and safety of the intended site occupants specified in the agreement entered into pursuant to this article.

(c) Notwithstanding subdivision (b) of Section 25395.102, on and after the date when the immunity specified in Section 25395.104 attaches, a person shall remain eligible for immunity obtained pursuant to this article with regard to a release that is the subject of a certificate of completion and immunities issued pursuant to Section 25395.104. If the person causes or contributes to a release of a hazardous material, other than a de minimis release, the person shall be responsible for responding to that release in accordance with all applicable law.

25395.106. (a) This article does not provide immunity from any of the following:

- (1) Liability for bodily injury or wrongful death.
 - (2) A requirement imposed under Chapter 6.5 (commencing with Section 25100), including, but not limited to, corrective action and closure and postclosure requirements.
 - (3) A criminal act.
 - (4) A permit violation.
 - (5) A contractual indemnity agreement between a purchaser and seller of real property.
 - (6) New releases, other than de minimis releases, of hazardous materials that are caused or contributed to by a bona fide ground tenant.
- (b) This article does not limit the authority of an agency to conduct a response action that is necessary to protect public health and safety or the environment pursuant to an applicable statute.
- (c) This article does not do either of the following:
- (1) Limit a defense to liability that may be available to a person under any other provision of law.
 - (2) Impose a new obligation on a bona fide ground tenant other than those specifically assumed by the bona fide ground tenant under an agreement entered into pursuant to this article.

SEC. 5. Article 8 (commencing with Section 25395.109) is added to Chapter 6.82 of Division 20 of the Health and Safety Code, to read:

Article 8. Repeal

25395.109. This chapter shall remain in effect only until January 1, 2010, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2010, deletes or extends that date.